No. 16022

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOS ANGELES MEAT AND PROVISION DRIVERS UNION LOCAL NO. 626 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*,

Appellants,

vs.

LEWIS FOOD COMPANY, a corporation,

Appellee.

APPELLANTS' OPENING BRIEF.

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Los Angeles Meat and Provision Drivers Union Local No. 626 of The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *et al.*,

Appellants,

vs.

Lewis Food Company, a corporation,

Appellee.

APPELLANTS' OPENING BRIEF.

Opinion Below.

The memorandum opinion and order of the trial court from which this appeal is taken is set forth in the Transcript of Record, page 27, herein referred to as [Tr.].

Statutes Involved.

The relevant provision of the National Labor Relations Act (29 U. S. C. 141 *et seq.*) are set forth in the Appendix, pages 1 to 3.

Question Presented.

Where a suit is filed by an employer under Title 29 U. S. C. 187(3) to recover damages against a labor union for picketing in the face of a certification and this suit is

filed after the General Counsel commences proceedings before the National Labor Relations Board under §8(a)-(2) to revoke the certification from its inception, should the suit be abated until the issues in the Board proceeding are completely and finally adjudicated?

Statement of Facts.

The present action is brought pursuant to the Labor-Management Relations Act, 29 U. S. C. A. §303(a)(3) and (b). This section authorizes suits for damages against labor organizations which strike to obtain recognition from an employer whose employees are represented by another union which has been *certified* by the National Labor Relations Board.

This appeal is taken from an order of Honorable Leon R. Yankwich denying a motion by the defendants to abate the above entitled damage action until the National Labor Relations Board fully and finally adjudicates certain unfair labor practice cases pending against the plaintiff company and an organization known as Association of Pet Foods Manufacturers Employees. In these cases the Board has alleged that the Association of Pet Foods Manufacturers Employees, the certified union, is and has been from its inception interfered with, dominated and controlled by the plaintiff company and therefore is not and never has been a *bona fide* trade union within the meaning of §8(a)(2) of the Act. If the Board is successful in these cases, it can order that the certification of the said Association be revoked *ab initio* and that the Association be disestablished. The defendant union has urged that if the Board ultimately revokes the Association certification in the pending cases, the sole basis for the present court action will have disappeared.

The material facts of this controversy are not in dispute. Outside of specific references to the transcript of record, the facts are set forth in the memorandum opinion of the trial court. [Tr. pp. 27-40.]

The plaintiff, Lewis Food Company, is a California corporation and maintains its principal place of business at 817 E. Eighteenth Street, in Los Angeles, California. It is engaged in the business of manufacturing, producing, distributing and selling pet foods. Said plaintiff produces and ships goods and materials in excess of $250,000.00 to the States of Oregon, Washington, Nevada, Arizona and the Territory of Hawaii. [Clk. Tr. pp. 4-5.] Said plaintiff will hereinafter be referred to as "Company."

Defendants Los Angeles Meat and Provision Drivers Union Local No. 626 is a labor organization which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, hours of employment and conditions of work. Said defendant will hereinafter be referred to as "Union."

The Association of Pet Foods Manufacturers Employees will hereinafter be referred to as the "Association."

Pursuant to an order of the National Labor Relations Board in Consolidated Case No. 21-RC-2358, 2405 an election was held among the employees at the Company on June 6, 1952. Appearing on the ballot was Local 563, Amalgamated Meat Cutters and Butchers Workmen of North America, AFL, and the Association. *The Union was not in any way involved in this proceeding.* The Association won the election and on July 22, 1952 was issued its Certificate of Representative pursuant to §9(a) of the Act. On September 11, 1952, the Company and the Association entered into a collective bargaining agree-

ment. (Intermediate Report and Recommended Decision pp. 3, 115 NLRB 136.)*

On or around August 5, 1954, the Union began enrolling as members the employees of the Company in the above described unit, and by August 17 had obtained authorization cards from a substantial number. During the period August 5-17, the Company discharged six employees. On August 17, 1954, Charles A. Potter, President of the Union, by letter to D. B. Lewis, President of the Company, advised that the Union represented a majority of the employees and requested negotiations to begin for a contract. On that same day, the Union instituted representation case 21-RC-3697 by the filing of a petition for certification with the Regional Office of the Board at Los Angeles. This petition was subsequently withdrawn. (Intermediate Report pp. 4-5.)

On August 19, 1954 up until October 19, 1954, the Union engaged in picketing. On *August 25, 1954* the Union filed charges of unfair labor practices in Case No. 21-CA-2061 alleging that the six men discharged before August 18, 1954 were discharged because of their activities on behalf of the Union. The charge further alleged that the Association was a company union within §8(a)(2). [Tr. p. 43.]

On December 17, 1954, the Board issued a complaint against the Union based upon an alleged violation of §8(b)(4)(C) of the Act. The hearings on this complaint were held on January 31, February 28, and March 8, 1955. At the hearings the general counsel was successful in having striken an affirmative defense the substance of

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*Hereinafter this document will be referred to as "Intermediate Report."

which was as follows: That the certification of the Association is invalid and unenforceable because: (1) the Association at and since the issuance of the certification was a company union within §8(a)(2) of the Act; (2) the certification was fraudulently obtained by the company and Association by withholding material facts; (3) the holding of the election and certification was an abuse of the Boards process; and (4) the representation proceeding from which the certification arose did not preclude the Union from showing the true status of the Association because it was not party to that proceeding. The Union counsel offered to prove that the Association was company dominated so that the Board could decide whether its administrative power could or should be used to promote and maintain a company dominated union, or decide that the original certification should not have been issued. The trial examiner sustained the motion to strike and rejected the Union counsel's offer of proof *on the ground that such evidence could not be urged defensively but had to be raised in an independent §8(a)(2) proceedings.* (Intermediate Report pp. 8-9.) At the time of the hearing, the petition and charges filed by the Union were pending before the Board and had not been acted upon. These rulings were affirmed by the Board in 115 N.L.R.B. No. 136. In that decision the Union was held to be in violation of §8(b)(4)(c).

On *March 29, 1955,* an employee of the company named Otto A. Roth filed a charge numbered 21-CA-2203 and 21-CB-708 against the Company and Association respectively alleging that the Association was a company union within the meaning of §8(a)(2) of the Act. [Tr. pp. 47-50.] On April 30, 1956 the Regional Director consolidated the two charges of Roth and the 1954 charge filed by the

Union into one complaint. The complaint alleged *inter alia:*

> "9. The employer since on or about January, 1952, has dominated and interfered with the formation and administration of the Association and has contributed financial and other support to the Association."
>
> "10. The Employer since on or about February 27, 1954, to date, has dominated, assisted and contributed to the support of, and interfered with the administration of the Association." [Tr. pp. 22, 51-57.]

On *June 11, 1956,* hearings on this consolidated complaint began before the Board Trial Examiner. On the first day of the hearing, a number of officials of the Company and Association refused to be sworn as witnesses or to produce documents in accordance with subpoenas which had earlier been served upon them at the request of the General Counsel and the Board. [Tr. pp. 22-24.] Because of this fact, Counsel for the Board requested and obtained an indefinite postponement of the resumption of the hearings before the Trial Examiner in order to give him an opportunity to apply for an order from the United States District Court compelling obedience to the subpoenas. On June 29, 1956, the District Court entered an order in Civil No. 20119-TC denying enforcement of the subpoenas. The order was reversed by this Court in 249 F. 2d 832, decided on October 29, 1957. On *June 9, 1958,* the United States Supreme Court upheld the ruling of this Court.*

On *June 11, 1956,* the Union resumed picketing in support of the Board's complaint. On June 14, 1956 the

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*357 U. S. 10.

Company filed charges numbered 21-CC-234 alleging that this picketing constituted a violation of §8(b)(4)(C) of the Act. [Tr. p. 57.] On October 14, 1956, the Regional Director dismissed these charges and this action was affirmed on January 11, 1957 by the General Counsel. [Tr. pp. 59-61.] The present damage action of the Company was filed on August 17, 1957, *over 15 months after the General Counsel issued its complaint against the Company and Association in an effort to revoke the certification previously issued.* It is undisputed that the Union did not engage in any picketing against the Company within the period October 19, 1954 to June 11, 1956.

ARGUMENT.

Appeal Is a Proper Means of Reviewing the Denial of a Motion to Abate.

The grounds for appeal are enumerated in 28 U. S. C. 1292. That section provides insofar as pertinent:

> "The courts of appeal shall have jurisdiction of appeal from: (1) Interlocutory orders of the District Courts of the United States . . . or of the judges thereof, granting . . . *refusing* or dissolving injunctions . . ."

It has been clearly established that the denial of a motion to abate constitutes a refusal by a trial court to exercise its injunctive powers and is therefore appealable within the above cited section.

In *Griesa v. Mutual Life Ins. Co. of N. Y.,* 165 Fed. 48, 50 an insurance company sued to cancel a life insurance policy. The insured's estate sued in the same court to recover the cash value of the policy. The company moved for a stay until its action was adjudicated.

The executor of the estate appealed from the trial court's grant of the stay. The company challanged the appealability of the order and the Court of Appeals said:

> "As the order or decree in question was made upon a hearing in equity and was interlocutory, the decisive question is, did it grant an injunction? To us, the answer does not seem doubtful. A court of equity possesses no power to stay proceedings in a court of law, save by granting an injunction against the litigant actors therein and this is so well recognized that in a court of equity, *a stay of proceedings in an action at law is sought or ordered, it is understood that it is this injunctive power that is invoked or exercised,* although the technical terms 'restrain and enjoin' be not used." (Emphasis added.)

In *United Fur Workers v. Colonial Hardwood Flooring Co.,* 168 F. 2d 33, 35, a company filed an action for damages against the union under §§301 and 303 of the Labor Management Relations Act for an alleged strike in breach of contract and secondary boycott activities. The union moved for a stay of proceedings upon the ground that the contract upon which the suit was based provided for arbitration of the matters in question. The union appealed the district court's denial of this motion and the appellate court said:

> *"The defendants have appealed from this order; and we think it clear that the denial of stay in such case is, in effect, the denial of an interlocutory injunction, from which immediate appeal lies to this court. Shanferoke Coal & Supply Corp. vs. Westchester Service Corp., 293 US 499; Enelow vs. The N. Y. Life Ins. Co., 293 US 379."* (Emphasis added.)

See also: *Ellclson v. Met. Life Ins. Co.,* 317 U. S. 188, 87 L. Ed. 176, wherein it was held that an order of abatement is in effect the exercise of interlocutory injunctive power.

It is therefore clear that the denial of defendants motion to abate this action pending the conclusion of proceedings before the National Labor Relations Board in an appealable order within the meaning of 28 U. S. C. 1292(1).

Since the Bona Fides of the Association and the Validity of Its Certification Are Principal and Dispositive Issues in This Case, the Court, Under the Doctrine of Primary Jurisdiction, Should Stay Proceedings Until the National Labor Relations Board Has Authoritatively Ruled Upon Such Issues in Its Pending Proceedings.

By way of clarification Appellants concede at the outset that the right to bring suit under §303(a)(3) and (b) of the Federal Act is not ordinarily dependent upon a finding by the National Labor Relations Board that a violation of §8(b)(4)(C) of the Act has occurred. Thus the fact that the General Counsel affirmed a dismissal of the Company's charges based upon the present picketing admittedly does not preclude this action. On the other hand, however, the Company has conceded and the record [Tr. pp. 51-57] discloses that the Regional Director commenced proceedings against the Company and Association on April 30, 1956 by the filing of a complaint wherein it attacked the *bona fides* of the Association since a date prior to the issuance of its certification. It is equally undisputed that if the General Counsel ultimately prevails in this proceeding, the certification of the Association will be revoked *ipso facto* from the date of its issuance. Since the damage action

authorized by §303(a)(3) by its terms *is completely dependent upon there being another labor organization with a certification,* the outcome of the Board proceeding numbered 21-CA-2067, 2203 and 21-CB-708 if favorable to the General Counsel *will destroy the sole basis for the instant court action.* The Union therefore requests that the Court, under the doctrine of primary jurisdiction, stay this action until the issues in the above numbered Board proceedings are fully and finally adjudicated.

The trial court in its opinion denying the Union's motion apparently treated this case as controlled by the decision in *ILWU v. Juneau Spruce Corp.,* 342 U. S. 237, 243, 96 L. Ed. 275, 281. In that case an employer brought suit for damages in a United States District Court under §303(a)(4) and (b) (jurisdictional dispute) prior to securing a determination from the National Labor Relations Board that the activities constituted an unfair labor practice under §8(b)(4)(D) of the Act. The Court held that §303(a)(4) could be invoked as a means of redress by damages independently of any action the Board takes as to the same conduct. The Court said:

> "Certainly there is nothing in the *language* of §303(a)(4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed." (Emphasis added.)

The trial court would interpret this decision as applied to the instant case in the following manner: The Company can obtain damages for peaceful picketing based solely upon the certification of the Association notwithstanding the fact that prior to its bringing of suit, the General Counsel attacked the validity of the certification from its inception and notwithstanding that the Board,

which is the only tribunal having jurisdiction to effect the certification, decides that (1) It erred in issuing the certification initially, and (2) The certification would not have been issued absent the withholding of material facts and fraudulent misrepresentation on the part of the Company and Association.

The substantial distinction between *Juneau Spruce* and the instant case is patent. The effect of *Juneau Spruce* was simply that a private party can sue for damages under §303(a)(4) without exhausting its administrative remedy before the Board. Presumably the Courts rational in the *Juneau Spruce* decision applies with equal validity to a suit filed under §303(a)(1) or (2) of the Act. However, a prerequisite to the successful maintenance of suit under §303(a)(3) and the sole basis thereof is the *existence of a certification.* If the Board in the presently pending proceedings grants the relief sought by the General Counsel and this ruling is affirmed on review, *then as a matter of law, the Association was never certified* and it will be ordered disestablished and disbanded. (*National Labor Relations Board v. Shed-Brown Mfg. Co.* (C. A. 7, 1954), 213 F. 2d 163; *National Labor Relations Board v. Standard Coil Products* (C. A. 1, 1955), 224 F. 2d 465.) It the evidence falls short of complete company domination, the Board may order the Company to cease and desist from giving effect to the certification and cease dealing with it as bargaining representative of employees. In any event, as the Supreme Court said in *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 600 in sustaining a company union disestablishment order:

> "The Board, not the Courts, determines under the statutory scheme how the effect of unfair labor practices may be expunged." (Emphasis added.)

The Board is fully empowered under §10(a) to void the certification from its inception and to order the Association disbanded upon a finding of company domination based upon facts preceding as well as following the certification. (*National Labor Relations Board v. Gilfillon Bros., Inc.* (C. A. 9), 148 F. 2d 990; *Wallace Corp. v. National Labor Relations Board,* 323 U. S. 248.)

It is therefore submitted that as the basis for the present action in the existence of a *certified* union, and since the *certification* was attached by the General Counsel prior to the bringing of this action, the doctrine of primary jurisdiction discussed herein requires the court to stay its hand pending the determination by the Federal agency of the issues which control this action.

The doctrine of primary jurisdiction has been stated as follows:

> "Primary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play whenever *enforcement of the claim requires the resolution of issues which under a regulatory scheme, have been placed within the special competence of an administrative body;* in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." (Emphasis added.)
>
> *United States v. Western Pac. R.R. Co.,* 352 U. S. 59, 63-64, 77 S. Ct. 161.

Similarly in *General American Tank Car Corp. v. Eldorado Terminal Co.,* 308 U. S. 422, 432, 84 L. Ed. 361, 367, the Supreme Court ordered a contract damage action between a shipper and a railroad stayed until the Interstate Commerce Commission could rule upon the question as to whether the contract sued upon provided

for an unlawful rebate under the Interstate Commerce Act. The Court's rationale is equally applicable to the present proceeding in which an essential issue is the validity of the Association certification and of its right to function as a labor organization:

> "When it appeared in the course of the litigation that an administrative problem, committed to the Commissioner was involved the Court *should have stayed its hand* pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act . . ." (Emphasis added.)

A clear statement as to the basis of the doctrine is contained in *Administrative Law Treatise,* Vol. 3, Davis (1958). At page 5 therein, it is stated:

> "The principal reason behind the doctrine is recognition of the need for *orderly and sensible coordination of the work of agencies and of courts.* Whether the agency happens to be expert or not, a court should not act upon subject matter that is pecularily within the agency's specialized field without taking into account what the agency has to offer, for otherwise *parties who are subject to the agency's continuous regulation may become the victims of uncoordinated and conflicting requirements.*" (Emphasis added.)

On page 6 therein, it is further stated:

> ". . . the choice that lies behind the doctrine is between judicial action taken without the benefit of what the agency has to offer to the particular problem, and judicial action that fully takes into account the administrative position on the particular problem."

The close interrelationship between court and agency in effectuating a statutory scheme is emphasized in *Far East Conference v. United States,* 342 U. S. 570, 574, 72 S. Ct. 492, 494. In holding that an antitrust action was subject to abatement in deference to the Federal Maritime Board, the court said:

> ". . . court and agency are not to be regarded as wholly independent and unrelated unstrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the others in securing the plainly indicated objects of the statute. *Court and agency are the means adopted to attain the prescribed end,* and so far as their duties are defined by the words of the statute, *those words should be construed so as to attain that end through coordinated action."* (Emphasis added.)

The courts have consistently ordered actions abated whenever an issue arises within the peculiar competence of the administrative agency. In *McLean Trucking Co. v. U. S.,* 321 U. S. 67, 64 S. Ct. 370, a private action was brought under §7 of the Sherman Antitrust Act, 26 Stat. 209, 15 U. S. C. A. §7 to enjoin the consolidation of certain motor carriers. The Court held that *despite the Act's provisions for private suit (as with §303),* the Interstate Commerce Commission should make a determination as to the effect of the consolidation on the over all transportation policy.

It seems clear that regardless of whether the ultimate relief sought is within the agency's power to grant, if some aspect of the court action involves the exercise of

administrative expertise, the agency should make its determination before the court assesses its legal significance. Since the question of *bona fides* of the Association arose prior to the commencement of this action and since the Board has exclusive power to order the Association disbanded and the *certification revoked,* the District Court should not undertake to assess damages against the Union based upon the *certification* until the Board has completed its determination. As stated in Administrative Law Treatise (*supra*) at page 27:

> "A court should not act without the agency's specific regulatory policy with respect to the particular problem in the particular circumstances."

Again at page 39 therein, it is stated:

> "The test is not whether some parts of the case are within the exclusive jurisdiction of the courts; the test is whether some parts of the case are within the exclusive jurisdiction of the agency. Because of the purpose of the doctrine—*to assure that the agency will not be by-passed on what is especially committed to it*—and because resort to the courts is still open after the agency has acted, the *doctrine applies even if the agency has no jurisdiction to grant the relief sought.*" (Emphasis added.)

Thus in *Thompson v. Tex Mexican Ry.,* 328 U. S. 134, 66 S. Ct. 937, a damage action was abated in deference to the Interstate Commerce Commission even though that agency lacked jurisdiction to award damages.

See also:

General American Tank Car Corp. v. El Dorado Terminal Co., 308 U. S. 422, 60 S. Ct. 325 (Stay of court to await I. C. C. determination of fact issue even though relief sought not available before commission);

Nathanson v. NLRB, 344 U. S. 25, 97 L. Ed. 23 30 (Stay by Bankruptcy Court to await NLRB determination of fact issue);

Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322 (Stay by District Court to await ruling by National Railway Adjustment Board on jurisdictional dispute even though Board cannot make compulsory rulings).

It is submitted that the doctrine consistently applied in analogous situation compells a stay of the instant damage action until the Board has determined whether as a matter of law, the certification ever had any validity.

Denial of the Union's Motion to Abate May Result in Permitting the Company and Association to Profit From a Certification Which Was Obtained Through the Perpetration of Fraud Upon the Company's Employees, the NLRB and the General Public.

It is undisputed that the General Counsel has in his complaint attached the *bona fides* of the Association from a period *prior* to the issuance of the certification. [Tr. p. 54.] It is equally undisputed that the Union attached the *bona fides* of the Association as far back as *August 25, 1954* and that the Regional Counsel did not process this charge until *April 30, 1956.* Again it is undisputed that the Board hearing commenced on June 11, 1956 and were interrupted *for the sole reason* that the Company

challenged the legality of Board subpoenas and that this issue was not resolved until *June 9, 1958* when the United States Supreme Court upheld their validity.

Although this precise factual situation has not presented itself in any reported decision, the equities compel an abatement of this action. If the General Counsel establishes his case, then the Association will be adjudicated to be in violation of §8(a)(3) from the outset and the certification wrongfully issued. Apparently in directing his attack prior to the certification, the General Counsel believes that *if evidence he now has was disclosed originally by the Company and Association, the latter would never have been certified.* If the government is successful in the Board proceeding, then the effect is as follows:

By concealing evidence of company domination, a certification of the Association was obtained; the employees were deprived of their rights to be represented by a *bona fide* labor organization under §7; the Company by conduct which would have subjected them to prosecution under §8(a)(3) was able to install a certified Association and thus frustrate lawful organization and realistic collective bargaining by *bona fide* trade unions; furthermore the Company by the use of the certification obtained wrongfully from the Federal government was able to convert otherwise lawful economic activities to unlawful and recover damages therefor.

The House Committee in discussing the Federal Statute reported (H.R. Rep. No. 1147, June 10, 1935, 74th Congress, 1st Sess.):

> "Collective bargaining is reduced to a sham when the employer sits on both sides of the table by supporting a particular organization with which he deals . . ."

The United States Court of Appeals in *National Labor Relations Board v. Griswold Mfgr. Co.,* 106 F. 2d 713 (3rd Cir.), stated the purpose and intent of the prohibition of §8(a)(2) as follows:

> "It is the intention of our labor legislation that labor organizations shall be truly representative of the employee's interests, and the *language* of §8 of the National Labor Relations Act prohibiting domination or interference with any labor organization *must be broadly interpreted so as to cover any conduct on the part of an employer which is intended to bring into being an organization which he has reason to believe will be 'friendly.'"* (Emphasis added.)

In further explaining the effect of the Federal prohibition on collective bargaining, it is stated in *American Enka Corp. v. NLRB,* 119 F. 2d 60:

> ". . . Collective bargaining becomes a delusion and a snare if the employer, either directly or indirectly, is allowed to sit on both sides of the bargaining table; and, with the great advantage that he holds as the master of pay and promotions, he will be on both sides of the table if he is allowed to take any part whatever in the choice of bargaining representatives by the employees."

The effect of denial of the Union's motion to abate would be to hold that the Company by the exercise of this wrongful and bad faith conduct and by its ability to conceal, until after securing the certification can convert protected lawful activities, *Mastro Plastics Corp. v. NLRB,* 350 U. S. 270, 100 L. Ed. 2d 309, into an actionable federal tort.

If the Action Is Not Abated the Union Will Be Exposed to Damages on the Sole Basis of the Certification, the Validity of Which It Has Never Been Permitted to Challenge.

It will be recalled that the Union filed a petition for election on *August 17, 1954* and charges of §8(a)(2) on *August 25, 1954* and that on December 17, 1954, the Board issued a complaint against the Union under §(8)(b)(4)(C). Hearings on this complaint were held on January 31, February 28, and March 8, 1955. The Union's charges had not been processed at the time of the §8(b)(4)(C) hearing. Yet in his *Intermediate report and Recommended Order, 115 NLRB No. 136,* the trial examiner in excluding all Union evidence as to lack of *bona fides* of the Association stated:

> "The Trial Examiner pointed out that the Union at any time could have filed a charge alleging Company domination for interference with the Association, and had the issue fully litigated before the Board and the Courts."

The effect of these circumstances is as follows: Although having the Union's charge before it in *August, 1954,* the Regional Counsel did not issue a complaint until *April 30, 1956.* The Union furthermore was not permitted to offer evidence of lack of *bona fides* at the §8(b)(4)(C) hearing. Thus because of an exercise of administrative discretion, the Company and Association escaped prosecution until June 11, 1956, the start of the present Board hearings, and conversely the *Union was not permitted for a period of almost two years to offer*

evidence against the bona fides of the Association although it attempted to use every available forum so to do.* When the Board hearings on the consolidated complaint were delayed indefinitely *as a result of the Company's refusal to honor the government's subpoenas,* the Union again was denied a forum by which to present evidence against the validity of the Association and certification. Thus through a series of circumstances *beyond the control of the Union,* charges filed against the Company and Association attacking the *certification* as far back as August 25, 1954 have not been as yet concluded. Surely under these circumstances the Company cannot be heard to complain that this action, based solely upon a *certification,* be abated until the Board determines whether the *certification* should be revoked from its inception. If the motion to abate is not granted, the Union may, as in the words of Professor Davis, become ". . . the victim of uncoordinated and conflicting requirements."

We recognize the principal argument in opposition to the Union's motion to-wit: Under the Union's theory, an employer will never be sure he is immunized from economic activities because of the possibility that the Board may subsequently revoke a certification. It is not necessary to reach this question under the facts of the instant case. The Union simply contends that where, as here, a Company commences suit under §303(a)(3) *after* the government through formal complaint alleges the Union in question was formed in violation of §(8)

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*In this connection, it is noted that the Union could not have attacked the Association in any state or federal court proceeding since exclusive jurisdiction to remedy unfair labor practices is vested in the NLRB. (*Garner v. Teamsters,* 346 U. S. 485; *Guss v. Utah Labor Relations Board,* 352 U. S. 817; *Weber v. Anheuser-Busch,* 348 U. S. 468.)

(a)(2), the court action should abate until the Board determines whether under its §10(a) equity power, it is advisable to revoke the certification from its inception. By so ruling this court can prevent a guilty employer from utilizing the fruits of his own unfair labor practices to gain damages against a labor organization which engages in conduct long held to constitute protected activity under the Federal Act.

Respectfully submitted,

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By HERBERT M. ANSELL,
Attorneys for Appellants.

"*Sec. 303. (a)* It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provision of §9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of §9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another

trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act."

"Sec. 303(b). Whoever shall be injured in his business or property by reason or any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

"Sec. 8(a). It shall be an unfair labor practice for an employer—"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: . . ."

"Sec. 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in §8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . ."